

January 28, 2003

Honorable Jim Hamilton
North Little Rock District Court
200 West Pershing Boulevard
North Little Rock, Arkansas 72114

RE: Advisory Opinion 2002-09

Dear Judge Hamilton:

You have requested an advisory opinion regarding out of court communications with victims in domestic abuse matters. When an individual in North Little Rock is arrested and charged with domestic abuse, he is required to sign a "no contact" order before being released from custody. That "no contact" order bars him from any contact with the victim.

Subsequently the victim, because of reconciliation or other factors, may attempt to have the "no contact" order lifted. The issue is whether, and under what circumstances, you or your staff may meet with the victim. An appropriate inquiry in such situations is whether the victim is acting voluntarily and with full awareness of the request, or whether fear or coercion is the motivating factor.

Discussion: The Arkansas Code of Judicial Conduct generally prohibits ex parte communications by the judge, or with the judge, concerning pending matters. Canon 3(A)(7). The request for a withdrawal of a "no contact" order is certainly a part of the domestic abuse charge itself, which is a pending matter before you.

Several options exist:

- 1) The prosecutor who arranged the "no contact" order originally may likewise agree to withdraw the order. This option involves you only to the extent of a judicial approval of the cancellation of the order. It is consistent with the Code of Judicial Conduct.
- 2) The victim may appear in open court and explain why she believes the "no contact" order should be withdrawn. This approach complies totally with the language and spirit of the Canon. However, although it is the approach most consistent with the Code, it is possible that the sheer number of requests may reduce the availability of this approach. In addition, issues of procedural fairness to the defendant may complicate this option.

- 3) The victim could meet with you personally and privately to request a cancellation of the "no contact" order. We believe that such an ex parte procedure is clearly prohibited by the language of Canon 3(A)(7). Information given to you would be highly relevant to the pending criminal procedures.
- 4) The victim could file a request with a designated member of your staff. That staff member could evaluate the sincerity of the request, and perhaps more importantly, possible intimidation or coercion felt by the victim. A trained and experienced staff member might be an appropriate method to handle these requests. We believe that given the unique circumstances presented here that such an arrangement would not violate the Code of Judicial Conduct.

However, this approach has flaws. The information that comes to your staff must be imputed to you, even if you are not directly involved. Situations may arise that would require you to recuse from hearing subsequent parts of the domestic abuse case. Canon 3(E).

- 5) A third party, neither your staff nor the prosecutor's staff, could be authorized to interview the victim and make a recommendation. We find nothing in the Code that would prohibit such a party, perhaps as a friend of the court, from interviewing the victim and making an evaluation or recommendation.

Conclusion: Our role in this situation is not to direct the actions or those of your staff, nor to choose among alternative approaches. Likewise, our role is not to tell the prosecutor how to operate his office or his staff. We cannot evaluate the workload placed upon judicial or prosecutorial staffs. Our role is limited to defining those options that are permissible and impermissible under the Code of Judicial Conduct.

However, we do believe that the best approach is for the prosecuting attorney to initiate a hearing for the cancellation of the order. A hearing in open court, with all the parties and the attorneys in attendance, permits the court or the prosecutor to question the victim and to be certain that the request for cancellation is truly voluntary.

Yours very truly,

Howard W. Brill
For the Committee

Judge Alderson and
Judge Bogard concur